

Vosilla v City of New York

2007 NY Slip Op 31995(U)

June 21, 2007

Supreme Court, Queens County

Docket Number: 0017426/2002

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X
JOSEPH VOSILLA,

Plaintiff,

Index
Number: 17426/02

Motion
Date: 06/19/07

- against -

Motion
Cal. Number: 19

THE CITY OF NEW YORK,
LONG ISLAND GENERAL SUPPLY CO., INC.,
RANDALL GORDON, ALEC GORDON, PEARL GORDON,
individually and as Trustee, pursuant to
a Trust Agreement made on July 19, 1993 by
ALEC GORDON as Grantor, SILVERADO MORENO,
MICHAEL MORENO and JOSEPH VALDERRAMA,

Motion Seq No. 3

Defendants.

-----X

The following papers numbered 1 to 9 read on this motion by plaintiff for leave to join third-party defendant as a direct defendant and to amend the pleadings and the caption.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-5
Affirmation in Opposition-Exhibits.....	6-8
Reply.....	9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiff to amend the complaint to join third-party defendant as a direct defendant and to amend the pleadings and the caption is granted solely to the extent that the caption of the action and all pleadings are hereby amended, nunc pro tunc, to read "PEARL GORDON, individually and as Trustee, pursuant to a Trust Agreement made on July 19, 1991 by

ALEC GORDON as Grantor, SILVERADO MORENO, MICHAEL MORENO and JOSEPH VALDERRAMA" in place and stead of "PEARL GORDON, individually and as to a Trust Agreement made on July 19, 1993 by ALEC GORDON as Grantor, SILVERADO MORENO, MICHAEL MORENO and JOSEPH VALDERRAMA," there appearing no opposition to plaintiff's request for said relief. The error in the date of the trust agreement recited in the caption is a mere irregularity that may be corrected at any stage of the action (see CPLR 2001). Moreover, there has been no showing that any party would be prejudiced by the granting of the amendment.

That branch of the motion to join third-party defendant A.O. Smith Corporation as a direct defendant is denied (see Downing v. Long Island General Supply Co., Inc., et al, Index No. 21779/02, decided by this Court on May 18, 2007).

This is a personal injury action in which plaintiff, a firefighter, was injured in the course of fighting a fire that took place on June 17, 2001 at the premises owned by defendant Long Island General Supply Company (hereinafter referred to as LIGS). Plaintiff commenced a timely action against defendants by filing a summons and complaint on June 26, 2002. Defendants LIGS and the Gordons commenced a third-party action against AO Smith by filing a third-party summons and complaint on March 16, 2006.

Plaintiff's and third-party plaintiff's causes of action sounding in negligence are governed by the three-year statute of limitations of CPLR 214(4). Likewise, third-party plaintiff's cause of action sounding in strict products liability is also governed by the three-year period of limitation of CPLR 214(5).

Plaintiff now moves for leave to add AO Smith as a direct defendant. AO Smith opposes the motion on the ground that an action against it is barred by the statute of limitations. Plaintiff contends that a direct claim against AO Smith is timely under the relation back doctrine. That doctrine allows a claim asserted against a defendant in an amended pleading to relate back in time for statute of limitations purposes to claims previously asserted against a co-defendant (see Buran v. Coupal, 87 NY 2d 173 [1995]).

In support of its argument that the relation-back doctrine applies to the facts of this case and that the Court should allow the joinder of AO Smith as a direct defendant, plaintiffs rely upon Duffy v. Horton Memorial Hosp. (66 NY 2d 473 [1985]), in which plaintiff was allowed to amend his complaint to assert a direct claim against the third-party defendant that would otherwise have been time-barred. Duffy held that since the third-party defendant had been served with the third-party complaint and the pleadings in the main action and, thus, at that point, had actual notice of the underlying claim and was aware of

the potential for a direct claim by plaintiff, it would not be violative of the policy considerations underlying the statute of limitations to deem the amended complaint to relate back to the date of commencement of the third-party complaint.

In the instant case, however, the third-party complaint was untimely, and, thus, a direct claim relating back to the untimely third-party action is unavailing. Since the third-party action was not commenced until after the statute of limitations had expired on the underlying claim, a direct claim against AO Smith is now, likewise, time-barred (see Mason v. Rodolitz Organization, 282 AD 2d 581 [2nd Dept 2001]; Zaveta v. Portelli, 127 AD 2d 760).

Plaintiff contends that the relation-back doctrine still applies to allow them to join AO Smith. Plaintiff argues that since AO Smith was a defendant in several other actions brought by different plaintiffs arising out of the same incident and, therefore, has participated in those actions, it would not be surprised or prejudiced by being joined as a defendant in the instant action. Plaintiff's argument, while imaginative, is without merit. Plaintiff cites no authority, and this Court is unaware of any, for the proposition that an untimely direct claim against a third-party defendant brought by one plaintiff may relate back to the timely commencement of a separate action brought by a different plaintiff.

Accordingly, that branch of the motion seeking joinder of A.O. Smith as a direct defendant is denied.

Dated: June 21, 2007

KEVIN J. KERRIGAN, J.S.C

